IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
JEFF ADER, MARK BERNSTEIN, AND BRIAN BURNETT, Petitioners,	§	
VS.	§	CIVIL ACTION NO. H-02-3193
J.P. MORGAN CHASE & CO., ET AL. Respondents.	§	

ORDER

Pending before the Court in the above referenced Verified Petition for Pre-Suit Discovery pursuant to Texas Rule of Civil Procedure 202, removed from the 80th Judicial District Court of Harris County, Texas and currently assigned to the Honorable Sim Lake, is Respondent Lehman Brothers, Inc.'s motion to consolidate (instrument #5) this proceeding with *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, MDL-1446, and *Newby et al. v. Enron Corporation, et al.*, H-01-3624.

Texas Rule of Civil Procedure 202.1 permits a petitioner to seek a state court order permitting it to conduct pre-litigation depositions to investigate potential claims. Rule 202 provides,

1106

> A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:
> (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or
> (b) to investigate a potential claim or suit.

The Verified Petition in the instant proceeding states that Petitioners were employed by Enron Corporation through some of Enron's wholly owned subsidiaries, including Enron Broadband Services and Enron Energy Services. It suggests that starting around 1997 Respondents began creating special purpose entities ("SPEs") to do business with Enron and to falsely inflate its profits and hide its debt. Once uncovered, this misconduct ended in Enron's bankruptcy and "Petitioners suffered significant financial loss as a result of Enron's financial disaster." Petitioners seek an order permitting them to conduct pre-suit discovery to investigate potential claims against Respondents J.P. Morgan Chase & Company, CitiGroup, Inc., Credit Suisse First Boston, Canadian Imperial Bank of Commerce, Bank of America Corporation, Merrill Lynch & Company, Barclays PLC, Deutsche Bank A.G., Lehman Brothers Holding, Inc., Arthur Andersen, L.L.P., Andersen Worldwide S.C., Jeff Skilling, Andrew Fastow, Richard Causey, David Duncan, and Debra Cash to "determine what role Respondents played in structuring, financing, auditing, and execution of the complex SPE business transactions so that Petitioners may ascertain whether there exist facts sufficient to warrant litigation against Respondents."

Although the Verified Petition is vague with respect to the precise legal basis for the claims and the standing of Petitioners, there is no question that Respondents are all named as Defendants in Lead Plaintiff's Consolidated Complaint in *Newby* and that the role of the SPEs in the alleged securities fraud constitutes a large part of that suit. Thus it appears that the instant action may overlap with and petitioners may be members of the proposed class(es) in *Newby* or in *Tittle et al. v. Enron Corp. et al.* Moreover, if this proceeding were consolidated into *Newby*, this Court observes it would in essence be currently mooted by the discovery stay imposed by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(B).

There is a substantial threshold question, however, regarding the propriety of the removal and of the Court's subject matter jurisdiction over this proceeding. The notice of removal states that the Rule 202 proceeding was removed pursuant to 28 U.S.C. §§ 1331, 1334, 1441, 1446, 1452 and 1651 and 15 U.S.C. §§ 77p(c), 78(u)-4(b)(3)(B) and 78bb(f)(2).

Both Texas and federal district courts have held that a Rule 202 request is an ancillary proceeding, not a separate civil suit, and not appropriate for removal. See, e.g., *Linzy v. Cedar Hill Independent School Dist.*, No. CIV. A. 3:00CV1864-AH. 2001 WL 912649 (N.D. Tex. Aug. 8, 2001)(Sanderson, Magistrate Judge)(concluding that under Texas state law the Rule 202 proceeding in dispute did not constitute a civil action and dismissing claim for malicious prosecution based on it), *aff'd*, 37

Fed. Appx. 90, 2002 WL 1021883 (5th Cir. May 9, 2002)[1]; *Mayfield-George v. Texas Rehabilitation Commission*, 197 F.R.D. 280, 283 (N.D. Tex.)(Rule 202 proceedings are not "civil actions" for purposes of removal because they do not allege a claim or cause of action upon which relief can be granted); *McCrary v. Kansas City Southern Railroad*, 121 F. Supp.2d 566, 569 (E.D. Tex. 2000)("Rule 202 Request is merely a *pre-suit* request for depositions to investigate a potential claim or suit"); *Office Employees Int'l Union v. Southwestern Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965); *Texacadian Energy, Inc. v. Lone Star Energy Storage*, 829 S.W.2d 369, 372 (Tex. App.-Corpus Christi 1992, no writ). In opposing the motion to remand, Respondents rely on Judge David Folsom's opinion in *In re Texas*, 110 F. Supp.2d 514, 518 (E.D. Tex. 2000)(holding that a Rule 202 proceeding was a "civil action" for purposes of removal under § 1441), which the Fifth Circuit characterized as "very thorough and well-considered" in *Real Parties in Interest*, 259 F.3d at 391. Nevertheless, in *Real Parties in Interest* the Fifth Circuit reversed Judge Folsom's ruling that he had removal jurisdiction under the All Writs Act and remanded the action to the state court from which it was removed. Furthermore, the Fifth Circuit's affirmance of *Linzy*, on May 9, 2002, came after the issuance of *Real Parties in Interest* on July 23, 2001.

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[1] The magistrate judge in *Linzy* relied on the two cases cited after *Linzy*, i.e., *Mayfield-George* and *McCrary*.

Furthermore, the Fifth Circuit has held that the All Writs Act, 28 U.S.C. § 1651, does not provide an independent basis for jurisdiction. *Texas v. Real Parties in Interest*, 259 F.3d 387, 392 (5th Cir. 2001), *cert. denied sub nom. Umphrey v. Texas*, 534 U.S. 1115 (2002); *In re McBryde*, 17 F.3d 208, 220 (5th Cir. 1997).

Furthermore because Petitioners seek pre-suit depositions only to determine whether they may have any claims against Respondents prior to consideration of whether to file a civil action, this Court finds that this proceeding is too inchoate, premature, and attenuated to "conceiveably affect" Enron Corporation's bankruptcy and thus provide the court with "related to" jurisdiction, although if it leads to a civil suit that may be "related to" Enron's bankruptcy, the issue may be raised in that action.

Because this Court concludes that it does not have subject matter jurisdiction over this proceeding, it

ORDERS that the motion to consolidate is DENIED.

This suit, however, is not on the undersigned judge's docket and it is authorized only to rule on the motion to consolidate even though the content overlaps with that in the motion to remand. In his order of October 21, 2002, Judge Lake indicated that he would rule on the motion to remand if the undersigned judge denied the motion to consolidate. Thus this action is returned to Judge Lake. Should he conclude that subject

matter jurisdiction exists and the removal is proper, this Court will reconsider the motion to consolidate.

SIGNED at Houston, Texas, this 23rd day of October, 2002.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE